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Federal Communications Commission

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Implementation of the Non-Accounting)	CC Docket No. 96-149
Safeguards of Sections 271 and 272 of the)	
Communications Act of 1934, as amended)	

THIRD ORDER ON RECONSIDERATION

Adopted: September 8, 1999

Released: October 1, 1999

By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION AND BACKGROUND

1. On December 24, 1996, the Commission adopted the *Non-Accounting Safeguards Order*¹ in its proceeding implementing the non-accounting safeguards provisions of the Communications Act of 1934 (the Act), as amended by the Telecommunications Act of 1996 (the 1996 Act).² These provisions generally prescribe the manner in which the Bell Operating Companies (BOCs) may enter certain markets, including the provision of in-region interLATA services.³ In this order, we address petitions for reconsideration or clarification of certain aspects of the *Non-Accounting Safeguards Order*. For the reasons discussed below, we deny all of the petitions. We also, on our own motion, clarify certain language in the *Non-Accounting Safeguards Order* relating to so-called teaming arrangements.

¹ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), petition for review pending sub nom. *SBC Communications v. FCC*, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), aff'd sub nom. *Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

² Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq. Hereinafter, all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code. The 1996 Act amended the Communications Act of 1934. We will refer to the Communications Act of 1934, as amended, as "the Act."

³ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21910, ¶ 4. An interLATA service is statutorily defined as "telecommunications between a point located in a local access and transport area [*i.e.*, in a LATA] and a point located outside such [LATA]." 47 U.S.C. § 153(21). A LATA, in turn, is statutorily defined as a "contiguous geographic area (A) established before the date of enactment of the Telecommunications Act of 1996 by a [BOC] . . . or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." *Id.* § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) plan of reorganization under which the BOCs were divested from AT&T. See *United States v. Western Elec. Co.*, 552 F. Supp. 131 (D.D.C. 1982), aff'd sub nom. *Maryland v. United States*, 460 U.S. 1001 (1983); *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983) (plan of reorganization), aff'd sub nom. *California v. United States*, 464 U.S. 1013 (1983). Among other things, the MFJ prohibited the BOCs from providing certain services, such as interLATA telecommunications and information services. The 1996 Act vacated the MFJ on a going-forward basis. See *United States v. Western Elec. Co.*, No. 82-0192 (D.D.C. Apr. 11, 1996). Lastly, an in-region interLATA service provided by a BOC is an interLATA service "originating in any of [that BOC's] in-region States," 47 U.S.C. § 271(b)(1), which is any state in which the BOC "was authorized to provide wireline telephone exchange service pursuant to the reorganization plan," *id.* § 271(i)(1).

2. BOC provision of in-region interLATA services is governed generally by sections 271 and 272 of the Act.⁴ The Commission must determine as a pre-condition to entry under section 271, among other things, whether the BOC will comply with the safeguards imposed by section 272 and the rules the Commission adopted in the *Non-Accounting Safeguards Order*.⁵ In particular, section 272, which is the subject of this order, addresses the safeguards and statutory separate affiliate requirements necessary for the BOCs' provision of manufacturing activities, interLATA telecommunications services originating in their in-region states, and interLATA information services.⁶

3. Consistent with the statutory framework, the Commission held in the *Non-Accounting Safeguards Order* that section 272 allows a BOC to engage in manufacturing activities, origination of certain interLATA telecommunications services, and the provision of interLATA information services, as long as the BOC provides these activities through a separate affiliate.⁷ The Commission's implementation of section 272 in that order was designed to prevent improper cost allocation between the BOC and its section 272 affiliate and discrimination by the BOC in favor of its section 272 affiliate.⁸ The Commission established a regulatory framework that was designed to enable all service providers to enter each other's markets and compete equally without allowing any one service provider "to game the regulatory requirements" and hinder competition.⁹

⁴ The Act bars a BOC from providing in-region interLATA services until it has demonstrated that it has complied with certain requirements enumerated in section 271. See 47 U.S.C. § 271(d). These include compliance with a 14-point competitive checklist and compliance with the requirements of section 272. See 47 U.S.C. §§ 271(c)(2)(A)(ii), 271(c)(2)(B)(i)-(xiv), 271(d)(3)(B). See also *SBC Communications Inc. v. FCC*, 138 F.3d 410 (D.C. Cir. 1998).

⁵ 47 U.S.C. § 271(d)(3)(B).

⁶ 47 U.S.C. § 272(a).

⁷ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21913, ¶ 14. Section 272(a)(1) provides that a BOC may not provide these services except through one or more affiliates that "are separate from any operating company entity that is subject to the requirements of section 251(c)." See 47 U.S.C. § 272(a)(1). We refer to this statutorily required separate affiliate as the "section 272 affiliate."

⁸ See also *Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, First Report and Order, 11 FCC Rcd 17539, 17550-51, ¶¶ 25-26 (1996) (*Accounting Safeguards Order*) (concluding that the existing accounting safeguards, with certain modifications, satisfy the accounting requirements of sections 260 and 271 through 276 and deter improper cost allocation).

⁹ *Non-Accounting Safeguards Order* at 21914-15, ¶¶ 15, 19.

4. The Commission clarified the meaning of several provisions in section 272 in the *Non-Accounting Safeguards Order*. For example, the statute requires the section 272 affiliate to "operate independently" from the BOC.¹⁰ The Commission interpreted the "operate independently" requirement in section 272(b)(1) to prohibit a BOC and its section 272 affiliate from: (1) jointly owning switching and transmission facilities or the land and buildings on which such facilities are located;¹¹ and (2) providing operation, installation, and maintenance services associated with each other's facilities.¹² The Commission also construed section 272(c)(1)'s nondiscrimination requirement as requiring a BOC to treat unaffiliated entities in the same manner as it treats its section 272 affiliate with respect to goods, facilities, and information that the BOC furnishes its section 272 affiliate and with respect to the rates, terms, and conditions at which those goods, facilities, or information are provided.¹³ The Commission further determined that the nondiscrimination requirement in section 272(c)(1) does not require a BOC to provide to unaffiliated entities different goods, services, facilities, and information from those provided to its section 272 affiliate in order to achieve the same level of quality or same functional outcome.¹⁴

5. Moreover, the Commission sought in the order to ensure that section 272 affiliates have the same opportunity to compete for customers as other long distance carriers. Accordingly, it adopted joint marketing rules interpreting section 271(e), which limit the ability of the largest interexchange carriers to market interLATA service with resold BOC local service until the BOC receives section 271(d) approval or until February 8, 1999, whichever comes first.¹⁵ The Commission further clarified that section 272 affiliates may provide local exchange service provided that the affiliates do not qualify as Local Exchange Carriers (LECs) subject to the requirements of section 251(c),¹⁶ and like other competitors, may purchase unbundled network elements under section 251(c)(3) and telecommunications

¹⁰ 47 U.S.C. § 272(b)(1).

¹¹ *Non-Accounting Safeguards Order* at 21981, ¶ 158.

¹² *Id.*

¹³ *Id.* at 22000, ¶ 202.

¹⁴ *Id.* at 22001, ¶ 202.

¹⁵ *Id.* at 22039, ¶ 277. Section 271(d) requires the Commission to determine not later than 90 days after receiving a BOC application to provide in-region interLATA services under section 271 to issue a written determination approving or denying such application. 47 U.S.C. § 271(d)(3).

¹⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055, ¶ 312.

services at wholesale rates under section 251(c)(4).¹⁷ Finally, the Commission shifted the burden of production in the context of section 271(d)(6) enforcement proceedings to the BOC in order to alleviate the burden on complainants and facilitate the detection of anticompetitive behavior.¹⁸

6. The Commission also determined that the nondiscrimination provision in section 272(e)(4) is not a grant of authority for the BOCs to provide interLATA or intraLATA facilities or services directly in contravention of the framework Congress established in section 271.¹⁹ On February 11, 1997, Bell Atlantic and Pacific Telesis (PacTel) sought summary reversal of the Commission's interpretation of section 272(e)(4) in the United States Court of Appeals for the District of Columbia Circuit.²⁰ On March 31, 1997, the court granted the Commission's request for a remand to reconsider its interpretation of section 272(e)(4) in the *Non-Accounting Safeguards Order*.²¹ A *Second Order on Reconsideration* affirming the Commission's interpretation of section 272(e)(4) was released on June 24, 1997.²² The Commission's interpretation of section 272(e)(4) in that order was subsequently affirmed by the United States Court of Appeals for the District of Columbia Circuit.²³ This *Third Order on Reconsideration* addresses petitions requesting that we clarify or reconsider other rules adopted in the *Non-Accounting Safeguards Order* to implement section 272 of the Act.

7. Parties request reconsideration with respect to the Commission's interpretation in the *Non-Accounting Safeguards Order* of various provisions in section 272. Several parties request reconsideration of the Commission's interpretation of the "operate independently" requirement in section 272(b)(1), which sets forth the requisite degree of structural separation

¹⁷ *Id.* at 22056, ¶ 313.

¹⁸ *Id.* at 22072, ¶ 345.

¹⁹ Section 272(e)(4) provides that a BOC and an affiliate that is subject to the requirements of section 251(c) "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate if such services or facilities are made available to all carriers at the same rates and on the same terms and conditions, and so long as the costs are appropriately allocated." See 47 U.S.C. § 272(e)(4).

²⁰ See *Bell Atlantic v. FCC*, No. 97-1067, Motion of Bell Atlantic and Pacific Telesis for Summary Reversal or for Expedition (filed D.C. Cir. Feb. 11, 1997).

²¹ See *Bell Atlantic v. FCC*, No. 97-1067, Order (D.C. Cir. Mar. 31, 1997) (citation omitted).

²² *Second Order on Reconsideration*, 12 FCC Rcd 8653 (1997).

²³ *Bell Atlantic, et al. v. FCC, et al.*, 131 F.3d 1044 (D.C. Cir. 1997).

between a BOC and its section 272 affiliate.²⁴ MCI also petitions the Commission to reconsider its decision not to impose reporting requirements pursuant to the nondiscrimination requirements of sections 272(c)(1) and 272(e).²⁵ MCI believes that reporting requirements are necessary to make these nondiscrimination obligations effective. In addition, BellSouth requests that the Commission broaden its interpretation of the terms "marketing" and "sale of services" in section 272(g)(3) to include product planning, design, and development.²⁶ Parties also petition the Commission to reconsider its implementation of section 272(a)(2)(C) governing the provision of interLATA information services. These parties request that we reconsider the Commission's determination that BOCs must provide interLATA information services through a section 272 affiliate, regardless of whether those interLATA information services originate outside of the BOCs' region or inside the BOCs' region.²⁷ Lastly, various petitioners request that the Commission clarify that BOCs may not provide interLATA information services, except those set forth in section 271(g)(4), in any of their in-region states prior to receiving section 271 authorization;²⁸ "clarify" that the provision of video programming is subject to the separate affiliate requirement for interLATA information services in section 272(a)(2)(C);²⁹ and reconcile the Commission's determinations in the *Non-Accounting Safeguards Order* with other proceedings, or alternatively, state that the decisions in the order do not supersede decisions in certain other Commission proceedings.³⁰

8. We deny the petitioners' requests to reconsider or clarify certain decisions in the *Non-Accounting Safeguards Order* for the reasons discussed in that order and herein, and we affirm these decisions as follows:

(a) We affirm the prior conclusion that section 272(b)(1)'s "operate independently" requirement has no plain or ordinary meaning.³¹

²⁴ AT&T Petition at 1-10; BellSouth Petition at 1-7; MCI Petition at 3-10; TCG Petition at 1-9.

²⁵ MCI Petition at 10.

²⁶ BellSouth Petition at 8-9. *See also* US WEST Comments at 15.

²⁷ BellSouth Petition at 10; US WEST Petition at 4-5.

²⁸ ALTS Petition at 2.

²⁹ Time Warner Petition at 5.

³⁰ Cox Petition at 2, 5.

³¹ *See discussion supra* Part II.A.

(b) We affirm the conclusion that specific reporting requirements to implement section 272(e)(1) are unnecessary at this time.³²

(c) We find unpersuasive BellSouth's argument that a broader reading of "marketing" and "sale of services" is consistent with the language and purpose of section 272, and affirm the view that the question of whether a section 272 affiliate is operating independently if a BOC designs and develops its affiliate's services should be decided on a case-by-case basis.³³

(d) We affirm the conclusion in the *Non-Accounting Safeguards Order* that section 272(a)(2)(C) does not exclude out-of-region interLATA information services from the separate affiliate requirement.³⁴

(e) We clarify that the conclusions in the *Non-Accounting Safeguards Order* are binding regardless of whether they are codified in the *Code of Federal Regulations* and decline to codify further those conclusions.³⁵

(f) We conclude in this *Third Order on Reconsideration* that section 272 of the Act does not require BOCs to provide video programming services through a separate affiliate.³⁶

(g) We clarify, on our own motion, that the *Non-Accounting Safeguards Order* was not intended as an affirmative sanction of teaming arrangements between a BOC and an unaffiliated entity.³⁷

(h) We further find that Cox's petition requesting the Commission to reconcile the *Non-Accounting Safeguards Order* with certain other proceedings is moot.³⁸

³² See discussion *supra* Part II.B.

³³ See discussion *supra* Part II.C.2.

³⁴ See discussion *supra* Part II.D.1.

³⁵ See discussion *supra* Part II.D.2.

³⁶ See discussion *supra* Part II.E.1.

³⁷ See discussion *supra* Part II.E.2.

³⁸ See discussion *supra* Part II.E.3.

II. ISSUES

A. Section 272(b)(1)'s "Operate Independently" Requirement

1. Inadequate Separation Of Operations

a. Background

9. Section 272(b)(1) directs that the separate affiliate required pursuant to section 272(a) "shall operate independently from the [BOC]."³⁹ In the *Non-Accounting Safeguards Order*, the Commission concluded that the "operate independently" requirement of section 272(b)(1) imposes certain requirements beyond the structural separation requirements contained in sections 272(b)(2)-(5).⁴⁰ As stated above, we concluded that the "operate independently" requirement precludes the joint ownership of transmission and switching facilities by a BOC and its section 272 affiliate, as well as the joint ownership of the land and buildings where those facilities are located.⁴¹ Additionally, we found that the "operate independently" requirement precludes a section 272 affiliate from performing operating, installation, and maintenance functions associated with the BOC's facilities. Likewise, it bars a BOC or any BOC affiliate, other than the section 272 affiliate itself, from performing operating, installation, or maintenance functions associated with the facilities that its section

³⁹ Section 272(b) states:

The separate affiliate required by this section --

- (1) shall operate independently from the Bell operating company;
- (2) shall maintain books, records, and accounts in the manner prescribed by the Commission which shall be separate from the books, records, and accounts maintained by the Bell operating company of which it is an affiliate; (3) shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate;
- (4) may not obtain credit under any arrangement that would permit a creditor, upon default, to have recourse to the assets of the Bell operating company; and
- (5) shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection.

47 U.S.C. §§ 272(b)(1)-(5).

⁴⁰ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981, ¶ 156.

⁴¹ *Id.* at 21981-82, ¶ 158.

272 affiliate owns or leases from a provider other than the BOC with which it is affiliated.⁴² The Order declined, however, to impose additional restrictions on the sharing of services⁴³ or on the joint ownership of other property between the BOC and its section 272 affiliate, concluding that additional structural separation requirements were unnecessary "given the nondiscrimination safeguards, the biennial audit requirement, and other public disclosure requirements imposed by section 272."⁴⁴

10. The *Non-Accounting Safeguards Order* also concluded that section 272(b)(3)'s "separate employee" requirement does not prohibit the sharing of services between a BOC and its section 272 affiliate beyond the services prohibited by section 272(b)(1).⁴⁵ We found that section 272(b)(3) "simply dictates that the same person may not simultaneously serve as an officer, director, or employee of both a BOC and its section 272 affiliate."⁴⁶ The Order concluded that the benefits from the sharing of services, other than the sharing of operating, installation, and maintenance services, in terms of favorable economies of scale and scope, outweighed any potential anticompetitive harms.⁴⁷

11. Several parties petition the Commission to reconsider its interpretation of the "operate independently" provision in section 272(b)(1). MCI and AT&T contend that the requirements the Commission adopted pursuant to section 272(b)(1) inadequately separate the functions of the BOC from those of its section 272 affiliate.⁴⁸ MCI urges the Commission to bar a BOC and its section 272 affiliate from jointly owning any property, engaging in joint research and development, and sharing administrative services.⁴⁹ MCI also contends that

⁴² *Id.*

⁴³ The "'sharing of services' means the provision of services by the BOC to its section 272 affiliate, or vice versa." *Id.* at 21990-91, ¶ 178.

⁴⁴ *Id.* at 21986, ¶ 167.

⁴⁵ Section 272(b)(3) states that the separate affiliate "shall have separate officers, directors, and employees from the Bell operating company of which it is an affiliate." 47 U.S.C. § 272(b)(3). *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91, ¶ 178.

⁴⁶ *Id.*

⁴⁷ *Id.* at 21990-93, ¶¶ 178-83.

⁴⁸ AT&T Petition at 2-10; MCI Petition at 2-9.

⁴⁹ MCI Petition at 5-6. MCI also seeks reconsideration of the Commission's determination to permit the section 272 affiliate to provide local services and to permit the BOC to transfer Official Services Networks to affiliates. MCI contends that permitting these activities also violates the "operate independently" requirement.

permitting a BOC to provide administrative services to its section 272 affiliate will undermine the "separate employee" requirement of section 272(b)(3). Similarly, AT&T asks the Commission to clarify that the *Non-Accounting Safeguards Order* prohibits a BOC and its section 272 affiliate "from integrating functions such as marketing, sales, advertising, service design and development, product management, facilities planning, and other activities."⁵⁰

12. In contrast to those petitioners that contend that our interpretation of the "operate independently" requirement results in inadequate separation of operations, BellSouth contends that the Commission exceeded its authority in defining the "operate independently" requirement to impose separation requirements beyond those contained in sections 272(b)(2)-(5).⁵¹ Specifically, BellSouth maintains that the Commission erred in finding that section 272(b)(1) prohibits a BOC affiliate, other than a section 272 affiliate, from providing installation and maintenance services to both the BOC and the section 272 affiliate.⁵² According to BellSouth, section 272(b) governs only the relationship between the BOC and its section 272 affiliate and does not bar another BOC affiliate from providing such services.⁵³

b. Discussion

13. We deny the parties' petitions to reconsider the interpretation of section 272(b)(1)'s "operate independently" requirement. The arguments AT&T and MCI put forth in support of imposing additional restrictions are largely the same as those raised, considered, and rejected previously in this docket.⁵⁴

We address these issues below in Subparts II.A.3 and 4, respectively.

⁵⁰ AT&T Petition at 3.

⁵¹ BellSouth Petition at 4; BellSouth Comments at 5.

⁵² Although the *Non-Accounting Safeguards Order* bars the joint provision of operating, installation, and maintenance functions, BellSouth's petition appears to address only the joint provision of installation and maintenance functions. BellSouth Petition at 1.

⁵³ BellSouth Petition at 6.

⁵⁴ See e.g., SBC Comments at 3 ("The arguments, suggestions, and objections raised by AT&T and MCI are fundamentally the same positions taken by them and others in the comments and reply comments filed in this Docket, which the Commission carefully considered and rejected."); BellSouth Comments at 6 ("Neither [AT&T nor MCI], however, present[] any new facts or grounds upon which the FCC can reexamine its interpretation of the 'operate independently' requirement.").

14. AT&T contends that the restrictions that the Commission adopted on joint activities fail to implement the "plain language" of the "operate independently" provision and that the Commission failed to explain why the restrictions it imposed sufficiently ensure operational independence.⁵⁵ We disagree with AT&T's contention that the degree of integration allowed between the operations of a BOC and its section 272 affiliate cannot be squared with the "plain language" or "ordinary meaning" of the section 272(b)(1) requirement that a BOC and its section 272 affiliate "operate independently." We emphasize that there is no plain or ordinary meaning of that phrase, as used in section 272(b)(1), that compels us to adopt a particular set of restrictions. We note that AT&T does not assert that the "operate independently" requirement is self-executing, as does BellSouth.⁵⁶ Indeed, AT&T, like the majority of commenters, concedes that we have discretion to interpret this term.⁵⁷ It is well-settled that agencies designated to implement statutes are generally authorized to interpret ambiguous terms.⁵⁸

15. Moreover, contrary to AT&T's assertions, the Order has adequately supported its reading of the "operate independently" requirement and balanced competing policies in a manner consistent with Congressional intent.⁵⁹ As was explained in the *Non-Accounting Safeguards Order*, Congress intended to strike a balance in section 272 between allowing the BOCs to attain efficiencies in their operations, and protecting ratepayers and competitors from anticompetitive behavior. We stated in the *Non-Accounting Safeguards Order* that the interpretation of the "operate independently" requirement "should ensure that the section 272 affiliate's competitors gain nondiscriminatory access to those transmission and switching

⁵⁵ AT&T Petition at 4.

⁵⁶ BellSouth Petition at 3 ("[T]he structural separation requirements of section 272(b) are complete unto themselves. . . . Section 272 does not give the Commission the ability to adopt substantive structural separation rules.")

⁵⁷ AT&T Reply at 4 ("the Commission enjoys some discretion to shape the specific requirements necessary to implement section 272(b)(1)"); US WEST Comments at 3 (Congress "left it to the Commission to determine whether any additional structural separations were necessary to ensure operational independence"); Ameritech Comments at 1, 5; MCI Comments at 6; TRA Comments at 4 (stating that there is no single consensus on a single, plain meaning of the term "operate independently" and, "as the record in this proceeding demonstrates, 'operate independently' can be interpreted in very different ways").

⁵⁸ See *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991) ("Judicial deference to an agency's interpretation of ambiguous provisions of the statutes it is authorized to implement reflects a sensitivity to the proper roles of the political and judicial branches [T]he resolution of ambiguity in a statutory text is often more a question of policy than of law.").

⁵⁹ AT&T Petition at 4.

facilities that both section 272 affiliates and their competitors may be unable to obtain from other sources."⁶⁰ In other words, we sought to ensure nondiscriminatory access to those facilities that are the most difficult or expensive to replicate. In contrast, we found that allowing the sharing of administrative services and joint ownership of property, such as office space, allows for economies of scale and scope without creating the same potential for anticompetitive discrimination by the BOC in favor of its section 272 affiliate.⁶¹

16. The Relationship between Sections 274(b) and 272(b)(1). AT&T asserts that the Commission failed in the *Non-Accounting Safeguards Order* to offer a reasoned or sufficient justification for not incorporating the more stringent structural separations imposed in section 274(b).⁶² We continue to reject the argument that the requirements of section 274(b)(1)-(9) should be read into the "operate independently" requirement of section 272(b)(1), as AT&T contends.⁶³ Section 274(b) "mandates that a separated affiliate or electronic publishing joint venture be 'operated independently'" and then lists requirements in nine subsections governing the relationship between a BOC and its separated affiliate.⁶⁴ In contrast, the "operate independently" provision in section 272 appears in a subsection 272(b)(1), which is one of five requirements in section 272(b). We affirm the conclusion in the *Non-Accounting Safeguards Order* that the enumerated separation requirements of section 274(b) should not be incorporated into the "operate independently" requirement of section 272(b)(1) because of the structural differences between sections 272(b) and 274(b).⁶⁵ The structural differences in the two sections indicate that the term "operate independently" in

⁶⁰ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21983, ¶ 162.

⁶¹ *Id.* at 21983-84, ¶ 162; accord Ameritech Comments at 5.

⁶² AT&T Petition at 6-8. Section 274 states that a BOC must provide an electronic publishing service through a separate affiliate or joint venture. Section 274(b) provides that the separate affiliate or joint venture "shall be operated independently from the BOC" and lists nine structural separation and transactional requirements that apply to the separated affiliate or electronic publishing joint venture. Sections 274(b)(2), (3), and (5)-(7) are the structural separation requirements of section 274(b). See 47 U.S.C. § 274(b)(1)-(7).

⁶³ AT&T Petition at 6-8.

⁶⁴ 47 U.S.C. § 274(b).

⁶⁵ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981, ¶ 157. The Commission also concluded in the *Electronic Publishing Order* that its interpretation of "operated independently" in section 274(b) "is not inconsistent with our determination in the *Non-Accounting Safeguards Order* that the section 272(b)(1) 'operate independently' provision imposes requirements beyond those contained in subsections 272(b)(2)-(5)." *In the Matter of Implementation of the Telecommunications Act of 1996: Telemessaging, Electronic Publishing, and Alarm Monitoring Services*, CC Docket No. 96-152, First Report and Order and Further Notice of Proposed Rulemaking, 12 FCC Rcd 5361 (1997) at 5389-90, ¶ 65 (*Electronic Publishing Order*).

section 272(b)(1) "should not be interpreted to impose the same obligations" as the enumerated requirements in sections 274(b)(1)-(9).⁶⁶ Moreover, construing "operate independently" in section 272(b)(1) to mean the same thing as "operated independently" in section 274(b) would render sections 272(b)(2)-(5), 272(c), and 272(e) redundant because the requirements in those sections and the enumerated requirements in sections 274(b)(1)-(9) overlap.⁶⁷ Therefore, giving the terms "operated independently" and "operate independently" the same meaning in both sections would violate the maxim that statutes must be construed, where possible, so that no provision is rendered inoperative or superfluous, thus we reject this argument.⁶⁸

17. Computer II and the Cellular Separation Rules. We also reject AT&T's contention that the Commission's interpretation of the "operate independently" requirement is irreconcilable with the prior interpretation of that same phrase in the *Computer II* and cellular structural separation rules.⁶⁹ There was no need to explain in the *Non-Accounting Safeguards Order* why it did not interpret the term "operate independently" to incorporate all of the structural separation requirements imposed in the *Computer II* or cellular structural separations rulemakings. We agree with Ameritech that there is no "precedent" in the Commission's rules that defines the term "operate independently" as used in section 272(b).⁷⁰ Rather, the Order interpreted "operate independently" to implement a new statutory provision, relying upon its accumulated expertise and predictive judgment.⁷¹ Moreover, we note that the *Non-Accounting Safeguards Order* determined that the requirements of *Computer II* would not necessarily increase an affiliate's operational independence. For instance, we noted that prohibiting an affiliate from constructing, owning, or operating its own local exchange facilities, as the requirements of *Computer II* would necessitate, could actually increase the affiliate's reliance on the BOC's facilities.⁷²

⁶⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981, ¶ 157.

⁶⁷ *Id.*

⁶⁸ See Ameritech Comments at 7-8.

⁶⁹ AT&T Petition at 8.

⁷⁰ See Ameritech Comments at 7-9. Ameritech asserts that the *Computer II* rules are not a suitable model for the definition of "operate independently" in section 272(b)(1) because the *Computer II* regime was established prior to divestiture, and, therefore, in a "completely different regulatory and competitive environment." *Id.*

⁷¹ See US WEST Comments at 12, n. 44.

⁷² See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21987, ¶ 170.

18. Shared Administrative Services. We also reject MCI's contention that the "operate independently" requirement of section 272(b)(1) requires fully separate operations. That argument was fully considered and rejected in the *Non-Accounting Safeguards Order*.⁷³ We affirm that the economic benefits to consumers from allowing a BOC and its section 272 affiliate to derive the economies of scale and scope inherent in the integration of some services outweigh any potential for harm to competition created thereby.⁷⁴ Consistent with the letter and purposes of section 272, the term "operate independently" does not require total structural separation, in light of the specific separation requirements, such as the requirement to maintain separate books, records, and accounts that Congress enacted in the rest of section 272(b).⁷⁵ We also disagree with MCI's assertion that the nondiscrimination and joint marketing provisions support its view that section 272(b)(1) requires fully separate operations because completely independent operations would facilitate enforcement of those provisions. We reject as well MCI's argument that the explicit permission for joint marketing in section 272(g) would not be necessary had Congress not contemplated fully separate operations.⁷⁶ Indeed, contrary to MCI's assertions, such provisions as the arm's length requirement in section 272(b)(5), the nondiscrimination requirement in section 272(c)(1), the Commission's accounting principles implemented in accordance with section 272(c)(2), and the joint marketing provision in section 272(g), suggest that Congress envisioned the type of sharing that MCI claims section 272(b)(1) prohibits.⁷⁷

19. Similarly, we affirm the previous conclusion that section 272(b)(3) simply prevents the same person from simultaneously serving "as an officer, director, or employee of both a BOC and its section 272 affiliate."⁷⁸ We are unpersuaded by MCI's suggestion that allowing a BOC to provide administrative services to its section 272 affiliate undermines the requirement of section 272(b)(3) and abolishes the affiliate's need for employees.⁷⁹ The *Non-*

⁷³ *Id.* at 21986, ¶ 168.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ MCI Reply at 2-3.

⁷⁷ *See Ameritech Comments* at 10-11.

⁷⁸ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91, ¶ 178.

⁷⁹ *See MCI Petition* at 8-9.

Accounting Safeguards Order addressed these contentions, and the parties provide no new reasons for us to reconsider the interpretation of section 272(b)(3).⁸⁰

20. Joint Provision of Operating, Installation, and Maintenance Services. Whereas AT&T and MCI contend that the Commission's interpretation of "operate independently" is too permissive, some of the BOC commenters argue that the Commission's interpretation is too stringent. BellSouth argues that the Commission improperly determined that section 272(b)(1) prohibits a BOC affiliate, other than the section 272 affiliate, from providing installation and maintenance services to both the BOC and its section 272 affiliate.⁸¹ Specifically, BellSouth maintains that if Congress intended to prohibit the provision of installation and maintenance services between a BOC and its non-section 272 affiliate, it would have stated so explicitly, as it did in section 274(b)(7)(B).⁸² The *Non-Accounting Safeguards Order* addressed and rejected this argument, and BellSouth has not offered persuasive reasons to reverse course.⁸³ As explained in that Order, allowing a third affiliate to provide such installation and maintenance services would, in essence, create a loophole around the separate affiliate requirement.⁸⁴ The *Non-Accounting Safeguards Order* determined that allowing the same personnel to perform operating, installation, and maintenance services for the BOC and the section 272 affiliate would create the opportunity for the substantial integration of these essential functions such that independent operation would be precluded.⁸⁵

⁸⁰ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21990-91, ¶ 178.

⁸¹ BellSouth Petition at 1-7. Although the *Non-Accounting Safeguards Order* bars the joint provision of operating, installation, and maintenance functions, BellSouth's petition appears to address only the joint provision of installation and maintenance functions.

⁸² BellSouth Petition at 4. Section 274(b)(7)(B) prohibits a BOC from performing the purchasing, installation, or maintenance of equipment on behalf of a separated affiliate, except for telephone service that it provides under tariff or contract subject to the provisions of section 274. BellSouth contends that the doctrine of *expressio unius est exclusio alterius*, which states that Congress, by including items in a list, intends to exclude all other items not listed, implies that Congress did not intend the additional restrictions in section 274(b) to be included in section 272(b).

⁸³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21984, ¶ 163. In that order, the Commission also rejected BellSouth's contention that the Commission lacked the authority to interpret section 272(b)(1), because it found that the "operate independently" requirement is not self-executing. *Id.* at 21981, ¶ 156. See also *supra* ¶ 16.

⁸⁴ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21984, ¶ 163.

⁸⁵ *Id.* at 21984, ¶ 163. The Commission also recognized the need for a limited exception to the prohibition on shared operating, installation, and maintenance services with regard to instances in which BOCs must obtain support services for sophisticated equipment purchased from the separate affiliate on a compensatory

Furthermore, the Commission determined that allowing the same individuals to provide core functions such as operating, installation, and maintenance for the BOCs and their section 272 affiliates would heighten the risk of improper cost allocation with regard to time spent and equipment utilized. Recognizing the burdensome regulatory involvement that would be necessary to detect and deter such cost misallocation, the Commission concluded that an outright prohibition of shared operating, installation and maintenance functions is necessary in the context of a section 272 affiliate.⁸⁶ Essentially, BellSouth offers no new rationale for us to reconsider this prior determination. Nevertheless, as the Commission recognized in the underlying order, section 272(b)(1) does not preclude a BOC or a section 272 affiliate from providing telecommunications services to one another, so long as each entity performs itself, or obtains from an unaffiliated third party, the operating, installation, and maintenance functions associated with the facilities that it owns or leases from an entity unaffiliated with the BOC.⁸⁷ Thus, although the incumbent and affiliate may not share operating, installation and maintenance personnel, a section 272 affiliate may use all methods of collocation offered by the incumbent, including virtual collocation, to collocate with the incumbent LEC.⁸⁸

2. Provision Of Local Exchange Service By Section 272 Affiliates

a. Background

21. The *Non-Accounting Safeguards Order* concluded that section 272 does not prohibit a section 272 affiliate from providing local exchange service in addition to interLATA services, provided that the section 272 affiliate does not qualify as an incumbent

basis. In such circumstances, the BOC may contract with the separate affiliate for the services, or the affiliate may train the BOC's personnel to perform such services. *See id.* at 21984-85, ¶ 164.

⁸⁶ *Id.* at 21984, ¶ 163.

⁸⁷ *Id.* at 21984, ¶ 164.

⁸⁸ Virtual collocation is "[a]n offering by an incumbent LEC that enables a requesting telecommunications carrier to: (1) designate or specify equipment to be used for interconnection or access to unbundled network elements to be located within or upon an incumbent LEC's premises, and dedicated to such telecommunications carrier's use; (2) use such equipment to interconnect with an incumbent LEC's network facilities for the transmission and routing of telephone exchange service, exchange access service, or both, or for access to an incumbent LEC's unbundled network elements for the provision of a telecommunications service; and (3) electronically monitor and control its communications channels terminating in such equipment." 47 C.F.R. § 51.5.

LEC subject to the requirements of section 251(c).⁸⁹ We determined that section 251 does not preclude a section 272 affiliate from obtaining resold local exchange service or obtaining unbundled network elements (UNEs) from its affiliated BOC pursuant to section 251(c).⁹⁰ The Order also addressed the issue of a BOC's transfer of legal ownership of its network facilities to its section 272 affiliate, concluding that, "if a BOC transfers to an affiliated entity ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), we will deem such entity to be an 'assign' of the BOC under section 3(4) of the Act with respect to those network elements."⁹¹ As a successor or assign, the affiliate would then be subject to the requirements of section 272. MCI and TCG petition the Commission to reconsider the decision to allow section 272 affiliates to provide local service.

b. Discussion

22. We reaffirm that section 272 does not, on its face, prohibit a section 272 affiliate from providing both local exchange and interLATA services.⁹² MCI and TCG contend that allowing BOC affiliates to provide local exchange and interLATA services violates section 272(b)(1)'s "operate independently" requirement and the statutory separate affiliate requirement, and permits integration that Congress intended to avoid.⁹³ In particular, MCI contends that allowing a section 272 affiliate to provide local service and interLATA service on an integrated basis: (1) will create a massive loophole in the section 251 nondiscrimination and interconnection requirements,⁹⁴ and (2) may result in BOCs allowing

⁸⁹ *Id.* at 22055-56, ¶ 312. Section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h). 47 U.S.C. § 251(c), (h).

⁹⁰ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22056, ¶ 313.

⁹¹ *Id.* at 22054, ¶ 309.

⁹² *See* US WEST Comments at 11 ("no party can point to any statutory language that would even suggest Congress' intent to prohibit this activity"); Ameritech Comments at 12. *See also* BellSouth Comments at 8. Ameritech contends that the separate subsidiary requirement only applies to the BOCs and their affiliates subject to section 251(c), so that reading section 272(b)(1) to require completely separate local and interLATA operations would expand the scope of section 272(a) to affiliates to which it does not currently apply. Ameritech Comments at 13. Further, SBC contends that section 272(a) does not prohibit the provision of local exchange and interLATA services through the same entity, but prohibits the provision of such combined services through a BOC or an affiliate subject to section 251(c). SBC Comments at 7.

⁹³ MCI Petition at 4; TCG Petition at 1.

⁹⁴ MCI Petition at 4.

their own local service operations to fall into disrepair.⁹⁵ We reaffirm that the statute does not preclude a section 272 affiliate from providing local exchange service, provided that the affiliate does not qualify as an incumbent LEC subject to the requirements of section 251(c).⁹⁶ We reject MCI's and TCG's arguments that allowing a section 272 affiliate to provide local exchange services violates the "operate independently" requirement and the separate affiliate requirement. We agree with the BOCs that Congress' intent in enacting section 272 was not to prevent a section 272 affiliate from providing both local exchange and long distance services.⁹⁷ Rather, as concluded in the *Non-Accounting Safeguards Order*, the purpose of the "operate independently" requirement is to prevent BOCs from abusing bottleneck control of local exchange facilities, which can lead to discrimination and cost-shifting, not to separate local and long-distance operations *per se*.⁹⁸ The BOCs' control over local exchange facilities does not extend to their section 272 affiliates.

23. In addition to finding that there is no statutory bar to allowing section 272 affiliates to provide local service, for the reasons discussed in the *Non-Accounting Safeguards Order*, we agree with the BOCs that there is no basis for concluding that allowing section 272 affiliates to provide local services poses competitive risks and is not sound public policy.⁹⁹

⁹⁵ *Id.*

⁹⁶ We also note that if a BOC transfers ownership to its section 272 affiliate of any "bottleneck" network elements that must be provided on an unbundled basis pursuant to section 251(c)(3), then the section 272 affiliate will be deemed an "assign" of the BOC under section 3(4) and subject to the same section 272(c) nondiscrimination requirements as the BOC. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22054, ¶ 309.

⁹⁷ See Ameritech Comments at 13-14. BellSouth asserts that section 272(g)(1) reflects Congressional intent to permit the BOCs to offer consumers "one-stop shopping" with regard to local and interLATA services once they obtain approval under section 271(d) to enter the interLATA market. BellSouth Comments at 9.

⁹⁸ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21981-82, ¶¶ 158-59. The view that Congress' core concern in enacting the separate affiliate requirement was with the potential for anticompetitive conduct in the design, construction, and operation of interLATA networks underlies the Commission's interpretation in the *Non-Accounting Safeguards Order* of the "operate independently" requirement in section 272(b)(1). *Id.* at 21981-87, ¶¶ 156-170. See also Ameritech Comments at 13.

⁹⁹ *Non-Accounting Safeguards Order* at 22057-58, ¶ 315. Ameritech contends that there is no credible evidence that existing safeguards supplemented by state requirements are inadequate to protect against anticompetitive behavior by the section 272 affiliate in providing local exchange and exchange access service. Ameritech Comments at 15. US WEST states that as a new market entrant, a section 272 affiliate cannot exercise the market dominance that would hinder competition. US WEST Comments at 11. SBC states that its competitors are already providing combined local and interLATA services, and if the Commission were to prohibit section 272 affiliates from offering the same, the BOCs would be at a competitive disadvantage. SBC Comments at 7.

We are not persuaded by TCG's argument that the risks of anticompetitive behavior are greater when a BOC provides UNEs rather than resold services to its section 272 affiliate.¹⁰⁰ TCG offers no new support for its assertion. We affirm that the risks of anticompetitive behavior, such as discrimination and improper allocation of costs, would not be greater when the BOCs provide UNEs to their section 272 affiliates than when they provide resold services.¹⁰¹ We reiterate that the existing safeguards in sections 251, 252, and 272, as well as antitrust laws, possible state regulations, and the Commission's existing cost allocation and affiliate transaction rules, as modified by the *Accounting Safeguards Order*,¹⁰² provide protection against improper cost allocation and discrimination.¹⁰³

24. The Order also found that allowing a section 272 affiliate to provide interLATA services as well as local services would encourage the affiliates to provide innovative new services.¹⁰⁴ TCG disputes this conclusion in its reconsideration petition arguing that the only innovative services that would result from allowing affiliates to provide local exchange and interLATA services are those that would result from the bundling and packaging of services through marketing. It further contends that, because the statute already permits joint marketing in section 272(g), prohibiting the provision of local exchange and in-region, interLATA services would not result in the loss of these potential new services.¹⁰⁵ We reaffirm that the increased flexibility from being able to offer "one-stop shopping" for both local and interLATA services further promotes competition in telecommunications markets, consistent with the 1996 Act, by allowing section 272 affiliates to create packages of services they would not be able to offer if confined to the rates and services of the BOCs.¹⁰⁶ We agree with Ameritech's contention that a section 272 affiliate that has the flexibility to offer local services is better able to develop innovative service packages targeted at niche markets or new pricing plans or distinct services.¹⁰⁷ We also agree with SBC that denying section 272 affiliates the opportunity to provide local service could limit the BOCs' ability to compete

¹⁰⁰ TCG Petition at 7.

¹⁰¹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22056-57, ¶ 314.

¹⁰² *Accounting Safeguards Order*, 11 FCC Rcd 17539 (1996).

¹⁰³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22057-58, ¶¶ 315, 317.

¹⁰⁴ *Id.* at 22057, ¶ 315.

¹⁰⁵ TCG Petition at 8.

¹⁰⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22057-58, ¶ 315.

¹⁰⁷ Ameritech Comments at 16.

with other carriers that offer bundled local and interLATA service.¹⁰⁸ As explained in the *Non-Accounting Safeguards Order*, "we also seek to ensure that BOC section 272 affiliates have the same opportunity to compete for customers as other long distance service providers."¹⁰⁹

3. BOC Transfer Of Official Service Networks To Its Section 272 Affiliate

a. Background

25. The *Non-Accounting Safeguards Order* determined that a BOC that seeks to transfer ownership of its Official Services Network¹¹⁰ to its section 272 affiliate in order to provide interLATA services must ensure that the transfer takes place in a nondiscriminatory manner, in accordance with section 272(c)(1), and must adhere to the affiliate transaction rules.¹¹¹

26. MCI petitions the Commission to prohibit a BOC from transferring or making available its Official Services Networks to its section 272 affiliate under any conditions.¹¹² It contends that the ability of a BOC to provide capacity on its Official Services Network to a section 272 affiliate would be evidence that the BOC built excess capacity into its network and subsidized its facilities from its local operations. Alternatively, should the Commission permit the transfer of Official Services Networks, ALTS urges the Commission to indicate that competitive LECs may bid on any BOC ownership transfers of those networks.¹¹³

¹⁰⁸ SBC Comments at 7.

¹⁰⁹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914-15, ¶ 17.

¹¹⁰ Under the MFJ, BOCs were allowed to maintain Official Services Networks which are interLATA networks that the BOCs utilize in the management and operation of their local exchange services. These interLATA networks are used to perform official services, such monitoring and controlling trunks and switches. See *United States v. Western Elec.*, 569 F. Supp. at 1097-1101.

¹¹¹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22008, 22034, ¶¶ 218, 266. See also 47 U.S.C. § 272(b)(5).

¹¹² MCI Petition at 14.

¹¹³ ALTS Petition at 3.

b. Discussion

27. We reaffirm the conclusion that a BOC may transfer its Official Services Network to its section 272 affiliate, if the transfer takes place in a nondiscriminatory manner, consistent with section 272(c)(1), and complies with the affiliate transaction rules.¹¹⁴ For the reasons discussed below, we find MCI's grounds to reconsider this conclusion unpersuasive.

28. The parties dispute the scope of the restrictions that the MFJ placed on the use of Official Services Networks. MCI contends that under the MFJ, the BOCs were authorized to maintain their Official Services Networks only for the management and operation of local exchange services.¹¹⁵ Because these networks were tailored for the BOCs' needs, MCI asserts that these networks will provide the BOCs and their section 272 affiliates a unique, discriminatory advantage.¹¹⁶ Additionally, MCI asserts that a BOC's ability to provide capacity on its Official Services Network to a section 272 affiliate indicates that the BOC has engaged in unauthorized cross-subsidization.¹¹⁷ SBC contends that the MFJ placed no limitations on transferring Official Services Networks, as long as the BOCs offered Official Services Networks on a nondiscriminatory basis.¹¹⁸ We need not resolve the dispute over the scope of the restrictions the MFJ imposed on the use of Official Services Networks because we have found that a BOC may, under the Act, transfer its Official Services Network to its section 272 affiliate, subject to the restrictions the Commission promulgated in the *Non-Accounting Safeguards Order* for use in the provision of interLATA services once section 271 approval has been obtained.¹¹⁹ Similarly, to implement the Act, we need not determine

¹¹⁴ See 47 U.S.C. § 272(b)(5). Section 272(b)(5) states that the "separate affiliate . . . shall conduct all transactions with the Bell operating company of which it is an affiliate on an arm's length basis with any such transactions reduced to writing and available for public inspection." *Id.* In the *Accounting Safeguards Order*, the Commission concluded that the existing affiliate transactions rules, with certain modifications, would satisfy the arm's length requirement of section 272(b)(5). See *Accounting Safeguards Order*, 11 FCC Rcd at 17593, ¶ 121. The Commission's affiliate transactions rules protect ratepayers and prevent improper cross-subsidization by requiring incumbent LECs, including the BOCs, to record the costs of transactions between regulated and nonregulated affiliates in accordance with a hierarchy of valuation methodologies. See 47 C.F.R. § 32.27.

¹¹⁵ MCI Petition at 5; MCI Reply at 8. See *United States v. Western Elec. Co.*, 569 F. Supp. at 1097-1101.

¹¹⁶ MCI Petition at 5.

¹¹⁷ *Id.*

¹¹⁸ SBC Comments at 9, citing *United States v. Western Elec. Co.*, 569 F. Supp. at 1002 n.54, 1018-19, 1023.

¹¹⁹ *Second Order on Reconsideration*, 12 FCC Rcd 8653 (1997).

whether BOCs have overbuilt their Official Services Networks, as MCI contends.¹²⁰ Rather, pursuant to the language of section 272(c) and 272(b)(5), we must ensure that the terms of the transfer of Official Services Networks are fair and consistent with our accounting rules.¹²¹

29. We reaffirm the conclusion in the *Non-Accounting Safeguards Order* that the nondiscrimination obligations established pursuant to section 272, other provisions of the Act, and state statutes and regulations provide sufficient protection in the event of a transfer of Official Services Network facilities.¹²² We are unpersuaded by MCI's argument that such a transfer cannot take place at arm's length in accordance with section 272(b)(5).¹²³ Transactions between a BOC and its section 272 affiliate involving the BOC's Official Services Network would have to comply with our affiliate transactions rules, which generally satisfy the arm's length requirement of section 272. The *Accounting Safeguards Order* found that, for certain affiliate transactions, good faith estimates of fair market value satisfy the arm's length requirement of section 272.¹²⁴ Furthermore, our public disclosure requirements help ensure the arm's length nature of the transaction by subjecting a BOC's transfer of its Official Services Network to intense scrutiny by both policymakers and the public.¹²⁵ Moreover, we reject MCI's unsupported assertion that the BOCs' transfer of Official Services

¹²⁰ SBC claims that there is no record evidence supporting MCI's assertion that the BOCs have overbuilt their Official Services Networks. It further claims that even if the BOCs' Official Services Networks were overbuilt, the affiliate transaction rules of section 272(b)(5), as well as the nondiscrimination requirement of section 272(c)(1), require that any transfer be nondiscriminatory, in writing, and at arm's length. SBC Comments at 9.

¹²¹ See also *Accounting Safeguards Order*, 11 FCC Rcd at 17588-17, ¶¶ 111-66; see also 47 C.F.R. § 32.27.

¹²² *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22055, ¶ 311.

¹²³ MCI Reply at 9.

¹²⁴ *Accounting Safeguards Order*, 11 FCC Rcd at 17609-10, ¶ 153. Incumbent LECs, including the BOCs, record asset transfers to nonregulated affiliates at the higher of net book value or estimated fair market value when neither a tariffed rate nor a prevailing company price applies to the asset transfer. See 47 C.F.R. § 32.27; see also *Accounting Safeguards Order*, 11 FCC Rcd at 17588-617, ¶¶ 111-66. When estimating fair market value to make this comparison, the Commission's rules permit incumbent LECs to perform a good faith estimate of the fair market value of the transaction. See, e.g., *Southern New England Telephone Co. Petition for Waiver of Section 32.27 of the Commission's Rules*, Memorandum Opinion and Order, DA 99-859 (rel. May 6, 1999).

¹²⁵ See *Accounting Safeguards Order*, 11 FCC Rcd at 17593-94, ¶¶ 121-24 (requiring BOCs to place on the Internet detailed written descriptions of transactions with section 272 affiliates and make such information available for public inspection at the BOCs' principal places of business).

Networks would inherently discriminate in favor of their section 272 affiliates.¹²⁶ Indeed, in the event the BOC decides to transfer ownership of its Official Services Network, the Commission has explained that the BOC must ensure that unaffiliated entities are given an equal opportunity, along with the 272 affiliate, to obtain ownership of this network.¹²⁷ We clarify, as requested by ALTS, that one way in which a BOC may provide such an equal opportunity to obtain ownership is to allow competing LECs to bid for ownership of its Official Services Network.¹²⁸

B. Reporting Requirements

1. Background

30. The *Non-Accounting Safeguards Order* concluded that, with the exception of section 272(e)(1), none of the reporting requirements of *Computer III/ONA* were needed at that time to facilitate the detection and adjudication of violations of the separate affiliate and nondiscrimination requirements of section 272.¹²⁹ The Order noted, however, that the Commission would revisit the need for reporting requirements should future developments warrant.¹³⁰

31. In declining to impose reporting requirements, the Order emphasized that the structural, transactional, and disclosure requirements of the Act will facilitate the detection of anticompetitive behavior.¹³¹ These requirements include: the section 272(b)(1) requirement to "operate independently"; the section 272(d) requirement that a BOC obtain and pay for a

¹²⁶ Specifically, MCI contends that the BOCs tailored their Official Services Networks to their unique needs, so that even if the BOCs made their Official Services Networks available to other carriers on a nondiscriminatory basis, those carriers would have no interest in acquiring the Networks. MCI Petition at 5; Reply at 10. In response, SBC states that there is no evidence suggesting that no other interexchange carrier would be interested in acquiring a BOC's Official Services Network. SBC Comments at 9. We note, however, that ALTS maintains that there is interest on the part of competitive LECs to bid on the transfer of these networks. ALTS Petition at 3.

¹²⁷ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22008, ¶ 218.

¹²⁸ We also note that, as a practical matter, there is no evidence that the BOCs are contemplating the transfer of their Official Services Networks.

¹²⁹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22060-61, ¶ 321.

¹³⁰ *Id.* at 22060-61, ¶ 321.

¹³¹ *Id.* at 22061, ¶¶ 322-23.

biennial joint federal/state audit to determine whether it has complied with section 272 and the regulations promulgated under section 272; the section 272(d)(3)(B) requirement that a BOC prove compliance with section 272 to gain section 271 authority; and the section 272(b)(5) requirement that all transactions between a BOC and its section 272 affiliate be reduced to writing and made publicly available. Moreover, we cited the potential for competitors to incorporate performance and quality measurements and standards into interconnection agreements.¹³²

32. MCI petitions the Commission to reconsider its decision not to impose reporting requirements pursuant to section 272(c)(1).¹³³ MCI and TRA maintain that, although the nondiscrimination requirements of sections 272(c) and (e) prohibit the BOCs from discriminating in the quality of the local exchange and exchange access services they provide, such requirements are unenforceable absent information about the quality of the services that the BOCs provide to their section 272 affiliates.¹³⁴ MCI contends that such information will not be available without reporting requirements.¹³⁵

2. Discussion

33. We decline to reconsider the conclusion reached in the *Non-Accounting Safeguards Order* that the reporting requirements of *Computer III/ONA* are not necessary, at this time, to ensure nondiscriminatory treatment of the BOC section 272 affiliates. Events since the time of that decision reinforce the conclusion that those specific requirements are unnecessary at this time. Chief among those events was our adoption of a Notice of Proposed Rulemaking setting forth a set of model performance measurements and reporting requirements for Operation Support Systems (OSS), interconnection and access to operator services and directory assistance.¹³⁶ We determined to establish model rules in the first instance in order to allow states that have begun their performance measurement and reporting requirement proceedings to incorporate the model rules as they deem beneficial, and as an aid to those states that have not yet begun such proceedings. We believed that adoption of model

¹³² *Id.* at 22062-63, ¶¶ 324, 326-27.

¹³³ MCI Petition at 10-13.

¹³⁴ MCI Petition at 10-13; TRA Comments at 12-14.

¹³⁵ MCI Petition at 10.

¹³⁶ *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, CC Docket No. 98-56, Notice of Proposed Rulemaking, 13 FCC Rcd 12817, 12827 (1998) (*Performance Measurements Notice*).

rules, instead of legally binding rules, was the most "efficient and effective role for the Commission in this area at this time."¹³⁷

34. The model performance measurements and reporting requirements are designed to help ensure that BOCs meet their nondiscrimination obligations when providing competing carriers access to critical support functions. Moreover, the notice specifically suggested that a BOC compare the performance it provides to competing carriers with the performance it provides to itself and its affiliates.¹³⁸ Additionally, the model performance measurements include certain of the measurements that MCI seeks in its reconsideration petition.¹³⁹ Finally, states, the Department of Justice, and the BOCs themselves have proposed performance measurements. The specific measurements that BOCs are proposing, or in some cases have begun to implement, are in many respects similar to those proposed in the *Performance Measurements Notice*.¹⁴⁰

35. For the foregoing reasons, we deny MCI and TRA's request to impose further reporting requirements at this time.

¹³⁷ *Id.* at 12820, ¶ 4.

¹³⁸ *Id.* at 12834-35, ¶ 39.

¹³⁹ See MCI Petition at 14. MCI submits that the BOCs should be required to report: (1) the failure frequency of local and exchange access circuits; (2) local and exchange access service repeat troubles as a percentage of trouble reports; and (3) the percentage of exchange access circuit failures within 30 days of installation. See also TRA Comments at 14. The *Performance Measurements Notice* tentatively concluded that incumbent LECs should provide performance measurements for the average time to restore service, frequency of troubles in a thirty day period, frequency of repeat trouble for a thirty day period, and percentage of customer troubles resolved within the estimated time. *Performance Measurements Notice* at 12854, ¶¶ 83-84.

¹⁴⁰ See, e.g., Letter and Attachment from Todd F. Silbergeld, Director-Federal Regulatory, SBC to Magalie Roman Salas, Secretary, FCC, dated March 19, 1998, CC Docket No. 97-121; Letter and Attachment from Kathleen B. Levitz, Vice President-Federal Regulatory, BellSouth to Carol Matthey, Chief, Common Carrier Policy and Program Planning Division, dated April 30, 1998, CC Docket Nos. 97-208, 97-231, 97-124, 97-137, 96-98, 98-56.

C. The Joint Marketing Restrictions Of Sections 271(e)(1) And 272(g)(3)**1. Section 271(e)(1) - Joint Marketing Of Local And Long Distance Services By Certain Interexchange Carriers**

36. We deny US WEST's request that the Commission clarify on reconsideration its interpretation of section 271(e)(1). This section provides that, for a period no longer than 36 months after implementation of the Telecommunications Act, certain interexchange carriers may not market interLATA services jointly with BOC local services purchased for resale.¹⁴¹ Because the 36-month period specified in this provision expired on February 8, 1999,¹⁴² this provision is no longer in effect and US WEST's petition for reconsideration on this issue is moot.

2. Section 272(g)(3) - "Marketing" And "Sale Of Service"**a. Background**

37. Section 272(g)(3) of the Act states that "[t]he joint marketing and sale of services permitted under this subsection [272(g)] shall not be considered to violate the nondiscrimination provisions of subsection (c)."¹⁴³ The *Non-Accounting Safeguards Order* concluded that activities such as customer inquiries, sales functions, and ordering are permitted under section 272(g)(3), because they involve only the marketing and sales of a section 272 affiliate's services, and therefore are exempt from the nondiscrimination requirements in section 272(c).¹⁴⁴ However, other activities advocated by parties as falling within the definition of "joint marketing and sale of services" may involve BOC participation in the planning, design, and development of a section 272 affiliate's offerings and were thus beyond the scope of the section 272(g) exception to the BOC's nondiscrimination obligations.¹⁴⁵ The *Non-Accounting Safeguards Order* declined to develop an exhaustive list of specific BOC activities covered by section 272(g).¹⁴⁶

¹⁴¹ 47 U.S.C. § 271(e)(1).

¹⁴² *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22039, ¶ 277.

¹⁴³ 47 U.S.C. § 272(g)(3).

¹⁴⁴ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22048, ¶ 296.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

38. BellSouth contends that the Commission construed the terms "marketing" and "sale of services" too narrowly and urges the Commission to include planning, design, and development within the meaning of those terms.¹⁴⁷ BellSouth states that Congress intended to allow the BOCs to enjoy the same freedom that the interexchange carriers have to develop, design, and market local and interLATA products, and BellSouth contends that the Commission has effectively created a new and disparate obligation applicable only to the BOCs to develop and design their competitors' interLATA services.¹⁴⁸

b. Discussion

39. We affirm that the reading of the section 272(g)(3) exemption from the nondiscrimination requirements of section 272(c) for "joint marketing and sale of services" is consistent with the language and purpose of section 272. The broad interpretation of the "joint marketing and sale of services" exception BellSouth advocates would create a loophole that would allow potential BOC discrimination in countless activities. Section 272(c)(1) would provide little protection against BOC discrimination were we to construe section 272(g)(3) as exempting all activities that may impact on marketing and sales activities from the nondiscrimination requirements. We disagree with BellSouth that the reading that we adopt imposes an unqualified obligation on the BOCs to develop and design their competitors' interLATA services.¹⁴⁹ According to BellSouth, the decision to exclude product planning, design, and development from the definition of "joint marketing and sale of services" in effect results in an obligation on the BOCs to design and develop services for competitors because such activities would be subject to the nondiscrimination requirement in section 272(c)(1).¹⁵⁰ As found in the *Non-Accounting Safeguards Order*, however, the BOC must develop these services on a nondiscriminatory basis for or with other entities if the BOC develops such services for or with its section 272 affiliate.¹⁵¹ Further, as to MCI's contention that a BOC that designs and develops its affiliate's services will not be operating independently, as

¹⁴⁷ BellSouth Petition at 8-9.

¹⁴⁸ BellSouth Petition at 9; BellSouth Reply Comments at 9.

¹⁴⁹ BellSouth Petition at 9. We also disagree with US WEST, which supports BellSouth's view that the Commission's definition of "marketing" and "sale of service" leads to the "bizarre" result that a BOC that aides in the design, planning, and development of a service with its section 272 affiliate must do the same for its competitors. See US WEST Comments at 15.

¹⁵⁰ BellSouth Petition at 9.

¹⁵¹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21986-87, ¶ 169.

required by section 272(b)(1),¹⁵² we affirm the view in the *Non-Accounting Safeguards Order* that such determinations should be made on a case-by-case basis.¹⁵³

D. InterLATA Information Services

1. Section 272 Separate Affiliate Requirement For Out-of-Region InterLATA Information Services

a. Background

40. The *Non-Accounting Safeguards Order* concluded that section 272(a)(2) of the Act requires the BOCs to provide out-of-region interLATA information services through a section 272 separate affiliate.¹⁵⁴ Section 272(a)(2)(B)(ii) requires a separate affiliate for the "origination of telecommunication services," other than "out-of-region services described in section 271(b)(2)."¹⁵⁵ The Order concluded that the section 272(a)(2)(B)(ii) exception extends only to out-of-region interLATA services that are telecommunications services and does not extend to out-of-region interLATA information services.¹⁵⁶ The Order also found that section 272(a)(2)(C) requires a separate affiliate for "interLATA information services," and exempts electronic publishing and alarm monitoring services from that requirement.¹⁵⁷ The Order concluded that the explicit exclusion of out-of-region interLATA telecommunications services in one subsection of the statute, and the lack of such an express exclusion of out-of-region interLATA information services in another subsection of the same provision, suggests that Congress did not intend to exclude out-of-region interLATA information services from the

¹⁵² MCI Comments at 9.

¹⁵³ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22048, ¶ 296.

¹⁵⁴ *Id.* at 21946-47, ¶¶ 85-87.

¹⁵⁵ 47 U.S.C. § 272(a)(2)(B)(ii). Section 271(b)(2), titled "Out-of Region Services," provides that, "[a] Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after the date of enactment of the Telecommunications Act of 1996, subject to subsection (j)." 47 U.S.C. § 271(b)(2).

¹⁵⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21946-47, ¶ 86.

¹⁵⁷ *Id.* at 21946-47, ¶ 86.

separate affiliate requirement.¹⁵⁸ BellSouth and US WEST petition us to allow BOCs to provide out-of-region information services on an integrated basis.¹⁵⁹

b. Discussion

41. We affirm the determination that the statute does not exclude out-of-region interLATA information services from the separate affiliate requirement, for the reasons discussed in the *Non-Accounting Safeguards Order*.¹⁶⁰ Accordingly, we reject US WEST's contention that the exception to the separate affiliate requirement in section 272(a)(2)(B)(ii) for "out-of-region services" applies to both interLATA telecommunications services and interLATA information services, in the same way that the reference to "incidental interLATA services" in section 272(a)(2)(B)(i) applies to both telecommunications services and information services.¹⁶¹ We note, moreover, in response to US WEST's assertion, the conclusion in the *Non-Accounting Safeguards Order* that the incidental interLATA services exception contained in section 272(a)(2)(B)(i) "applies, by its terms, to the origination of incidental interLATA services that are telecommunications services."¹⁶² Although services such as video and audio programming services, which do not appear to be solely telecommunications services, are listed within the exception, the Order stated that the limitation in section 271(h) "specifies that these incidental interLATA services 'are limited to those interLATA transmissions incidental to the provision'" of those services.¹⁶³ Therefore, US WEST's argument that the incidental interLATA exception encompasses both telecommunications and information services is not persuasive. Furthermore, MCI and TRA contend that the exception for "out-of-region services" in section 272(a)(2)(B)(ii) cannot include services outside of the universe of services in section 272(a)(2)(B) -- "interLATA telecommunications services."¹⁶⁴ In other words, section 272(a)(2)(B), which governs the "origination of interLATA telecommunications services," explicitly excludes out-of-region services from the "telecommunications" services restriction, whereas section 272(a)(2)(C), which applies specifically to "interLATA information services," does not exempt out-of-region

¹⁵⁸ *Id.*

¹⁵⁹ See BellSouth Petition at 10; US WEST Petition at 4-5.

¹⁶⁰ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21946-47, ¶ 86.

¹⁶¹ US WEST Petition at 4.

¹⁶² *Non-Accounting Safeguards Order* at 21950, ¶ 93.

¹⁶³ *Id.* at 21950, ¶ 94.

¹⁶⁴ MCI Comments at 3; TRA Comments at 8.

services from the interLATA information services restriction.¹⁶⁵ Section 272(a)(2)(C) provides that a separate affiliate is required for "[i]nterLATA information services, other than electronic publishing . . . and alarm monitoring services."¹⁶⁶

42. Instead, we agree with MCI and TRA that the only exceptions to the separate affiliate requirement for interLATA information services are the two specifically identified in section 272(a)(2)(C), *i.e.*, electronic publishing and alarm monitoring. Thus, we likewise reject BellSouth's argument that interLATA information services must fall within the scope of exempted out-of-region "interLATA services" because, by definition, interLATA information services are provided via telecommunications that cross LATA boundaries.¹⁶⁷ We instead agree with MCI that if Congress had intended to exclude out-of-region interLATA information services from the separate affiliate requirement, it would have done so explicitly.¹⁶⁸ We further reject US WEST's and BellSouth's contention that it is incongruous as a policy matter to exclude out-of-region interLATA telecommunications services from the separate affiliate requirement, but to require a separate affiliate for out-of-region interLATA information services.¹⁶⁹ This policy argument is foreclosed given that the statute requires that BOC out-of-region interLATA information services be offered through a separate 272 affiliate. We, therefore, deny US WEST's and BellSouth's petitions for reconsideration on this ground.

2. Codification Of *Non-Accounting Safeguards Order* Requirements

a. Background

43. Several new rules, enumerated in Appendix B of the *Non-Accounting Safeguards Order*, were promulgated upon adoption of that order. The rules are codified at 47 C.F.R. Part 53. The *Non-Accounting Safeguards Order* also imposed numerous other requirements that were not codified in our rules.

44. ALTS submits that we should codify the conclusion in the *Non-Accounting Safeguards Order* that "BOCs may not provide interLATA information services, except for

¹⁶⁵ 47 U.S.C. § 272(a)(2)(B).

¹⁶⁶ 47 U.S.C. § 272(a)(2)(C).

¹⁶⁷ BellSouth Petition at 11-12.

¹⁶⁸ MCI Comments at 4. *See Non-Accounting Safeguards Order*, 11 FCC Rcd at 21946-47, ¶ 86.

¹⁶⁹ US WEST Petition at 4-5; US WEST Reply Comments at 4; BellSouth Reply Comments at 5-6.

information services covered by section 271(g)(4), in any of their in-region states prior to obtaining section 271 authorization."¹⁷⁰ ALTS claims that codifying this requirement would reduce the potential for non-compliance and litigation by the BOCs.¹⁷¹ Accordingly, ALTS recommends that the Commission modify section 53.201 of our rules.¹⁷²

b. Discussion

45. As an initial matter, we note that the requirement addressed by ALTS in its petition has been modified by subsequent Commission action. In the *First Order on Reconsideration* in this proceeding, we clarified that, prior to obtaining section 271 authorization, BOCs may provide any interLATA information service designated as an incidental interLATA service under section 271(g), not just those enumerated in sub-section 271(g)(4), as suggested in the *Non-Accounting Safeguards Order*.¹⁷³ In clarifying this exception, we confirmed the general rule that BOCs may not provide any other interLATA information services in their in-region states prior to obtaining section 271 authorization.¹⁷⁴

¹⁷⁰ ALTS Petition at 2, citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21964, ¶ 121. Section 271(g)(4) provides that:

the term 'incidental interLATA services' means the interLATA provision by a Bell operating company or its affiliate --

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA.

47 U.S.C. § 271(g)(4).

¹⁷¹ ALTS Petition at 2.

¹⁷² *Id.* at 3-4.

¹⁷³ *First Order on Reconsideration*, 12 FCC Rcd 2297 (1997). The relevant modified paragraph now reads:

Therefore, we conclude that BOCs may not provide interLATA information services, except for those designated as incidental interLATA services under section 271(g) in any of their in-region states prior to obtaining section 271 authorization.

Id. at 2299-2300, ¶ 3.

¹⁷⁴ *Id.*

Like other conclusions in the *Non-Accounting Safeguards Order* and in the *First Order on Reconsideration*, this requirement is binding regardless of whether it is codified in the C.F.R.¹⁷⁵ We decline to single out this particular requirement for codification because, as ALTS recognizes, "there can be no possible confusion about this requirement."¹⁷⁶ We therefore deny the ALTS petition for reconsideration on this issue.

E. Other Issues

1. Applicability Of Section 272 To Video Programming Services

a. Background

46. The *Non-Accounting Safeguards Order* concluded that, "pursuant to section 272(a)(2)(B)(i), BOCs are not required to provide the interLATA telecommunications transmission incidental to the provision of programming services listed in sections 271(g)(1)(A), (B), and (C) through a section 272 affiliate."¹⁷⁷ We found this conclusion to be consistent with the determination in the *OVS Second Report and Order*,¹⁷⁸ where it was determined that BOCs are not required to provide open video services through a section 272 affiliate.¹⁷⁹ The *Non-Accounting Safeguards Order* also determined that neither section

¹⁷⁵ See *Iowa Utilities Bd. v. FCC*, 120 F.3d 753, 803 (8th Cir. 1997) (stating that the provisions of an FCC order, and the rules adopted therein, are equally enforceable), *rev'd in part and aff'd in part*, *AT&T Corp., et al. v. Iowa Utils. Bd. et al.*, 119 S.Ct. 721.

¹⁷⁶ ALTS Petition at 2.

¹⁷⁷ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21950-51, ¶ 94.

¹⁷⁸ *Id.* at 21950-51, ¶ 94, n. 210; see also *Implementation of Section 302 of the Telecommunications Act of 1996*, CS Docket No. 96-46, Second Report and Order, 11 FCC Rcd 18223 (1996) (*OVS Second Report and Order*).

¹⁷⁹ In the *OVS Second Report and Order*, the Commission determined that section 653 is silent as to the need for a separate affiliate to provide video services and that Title II requirements cannot be applied to the establishment and operation of Open Video Systems (OVS) under section 653. Section 653 provides that a local exchange carrier may offer cable service in its telephone service area and be subject to a reduced regulatory burden, if it complies with the requirements of the section and completes a certification. In the order, the Commission also declined to address whether the provision of video programming would qualify as an "information service" under section 272(a)(2)(C). See *OVS Second Report and Order*, 11 FCC Rcd at 18347-48, ¶ 249; 47 U.S.C. § 653.

271(h), which limits incidental interLATA services,¹⁸⁰ nor section 254(k), which address the issue of improper cost allocation with regard to universal service, requires the imposition of separate affiliate requirements on exempt "incidental interLATA services" in order to protect telephone exchange ratepayers or competition in the telecommunications market.¹⁸¹

47. Time Warner asks us to clarify on reconsideration that section 272 requires a BOC to establish a separate affiliate to provide video programming services to end users, while it exempts the underlying transmission service or the OVS platform, which may be provided by a BOC's local telephone company.¹⁸² Time Warner contends specifically that section 271(h) distinguishes between the transmission underlying video programming and the video programming service itself.¹⁸³ While Time Warner concedes that the underlying BOC transmission service used to provide audio, video, and other programming services is an "incidental interLATA service" exempt from section 272's requirements, Time Warner contends that the video programming service itself is an information service fully subject to the separate affiliate requirement of section 272(a)(2)(C).¹⁸⁴

48. Several BOCs maintain, on the other hand, that video programming services are not information services and therefore are not subject to section 272(a)(2)(C).¹⁸⁵ They

¹⁸⁰ Section 271(h) provides that the "incidental interLATA services" in sections 271(g)(1)(A), (B), and (C) "are limited to those interLATA transmissions incidental to the provision by a [BOC] or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public." 47 U.S.C. § 271(h).

¹⁸¹ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21951-52, ¶ 96.

¹⁸² Time Warner Petition at 6.

¹⁸³ *Id.* at 3-4; *see also* Cox Comments at 2-3. Cox supports Time Warner's position that the separate affiliate requirements of section 272 apply to video programming services and that this conclusion is not a matter within the Commission's discretion.

¹⁸⁴ Time Warner Petition at 5.

¹⁸⁵ Ameritech contends that video programming services do not fall within the Act's definition of "information services," because such services do not offer "a capability for generating, acquiring, transforming, processing, retrieving, utilizing, or making available information via telecommunications" and are not provided "via telecommunications." Moreover, Ameritech contends that the transmission of video programming is the transmission of information of the video provider's choosing rather than information of the "user's choosing," as the Act's definition of "telecommunications" requires. Ameritech Comments at 21-22; *see also* 47 U.S.C. §§ 153(20), (43). BellSouth contends that, under the plain terms of the statute, a separate affiliate is not required for video programming and that such a requirement would be contrary to the statute and the Commission's

contend that the exemption for "incidental interLATA services" from the requirements of section 272 could not apply to one aspect of a service offering and not the other, because the interLATA transmission component of an interLATA information service is by definition a necessary, bundled feature of the offering of information services.¹⁸⁶ According to Ameritech, although the exemption in section 272(a)(2)(B)(i) may only pertain to the interLATA transmission incidental to video programming, it is only the incidental interLATA transmission, not the video programming service, that could trigger the separate affiliate requirement.¹⁸⁷ SBC explains that video programming without the transmission component "is not a transport service and by definition cannot be characterized as either interLATA or intraLATA."¹⁸⁸ Therefore, as SBC contends, only if the video programming service includes an interLATA transmission, can it become an interLATA service subject to the separate affiliate requirement.¹⁸⁹ Relying on the language of the *Non-Accounting Safeguards Order*, SBC claims that, "[where an interLATA transmission necessary to obtain interLATA access to a BOC information service is provided by another carrier], the BOC is *not providing any interLATA services*, and therefore is not required by section 272 to provide the information service in question through a separate affiliate."¹⁹⁰

49. In addition, Ameritech claims that there is no policy reason for imposing a separate affiliate requirement on video programming services, because separate affiliates are unnecessary for OVS.¹⁹¹ US WEST further contends that video programming services

precedent, including the *OVS Second Report and Order*. Additionally, BellSouth interprets section 271(h) as specifically authorizing a BOC and a BOC affiliate to provide video programming services and the interLATA transmission incidental thereto. BellSouth Comments at 1-4. *See also* SBC Comments at 12-13.

¹⁸⁶ Ameritech claims that this argument is supported by the Commission's definition of interLATA information services in the *Non-Accounting Safeguards Order*. *See* Ameritech Comments at 22; BellSouth Comments at 3. The Commission stated that "the term 'interLATA information service' refers to an information service that incorporates as a necessary, bundled element an interLATA telecommunications transmission component, provided to the customer for a single charge." *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21961-62, ¶ 115.

¹⁸⁷ Ameritech Comments at 21-22; SBC Comments at 12-13.

¹⁸⁸ SBC Comments at 12.

¹⁸⁹ *Id.* at 13.

¹⁹⁰ *Id.* at 13 (emphasis added); *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21962-63, ¶ 117.

¹⁹¹ Ameritech Comments at 23-24. Ameritech further contends that since a principal purpose of a separate affiliate requirement is to ensure that competitors have nondiscriminatory access to telecommunications facilities, such a requirement is not necessary in the context of a service like cable, which is provided over facilities that

provided by common carriers, other than on a radio-based system or a common carriage basis, are governed solely by Title VI of the Act under section 651(a)(3)(A), which specifically precludes the application of Title II to open video systems.¹⁹² Therefore, US WEST contends that without an express exemption from Title VI, video programming is not subject to Title II common carrier regulation.¹⁹³

b. Discussion

50. We agree with the BOCs that section 272 of the Act does not require BOCs to provide video programming services through a separate affiliate. As noted above, sections 271(g)(1)(A), (B) and (C), along with section 271(h), define interLATA transmissions incidental to the provision by a BOC or its affiliate of video, audio, and other programming services as "incidental" interLATA services.¹⁹⁴ Section 272(a)(2)(B)(i) exempts such incidental interLATA services from the section 272 separate affiliate requirement.¹⁹⁵ Although we recognized in the *Non-Accounting Safeguards Order* that section 271(g) applies "narrowly" to transmissions incidental to the provision by a BOC or its affiliate of video, audio or other programming services,¹⁹⁶ it does not follow, as Time Warner suggests, that the BOCs must provide the programming component of such services through a separate affiliate, pursuant to section 272(a)(2)(C).

51. As Ameritech and SBC recognize, it defies logic to suggest that a transmission component that itself is expressly exempt from the separate affiliate requirements would render the video programming component (which is neither intraLATA nor interLATA) subject to these same requirements.¹⁹⁷ There is no indication that Congress intended section 271(h) to cancel out the exemption for audio, video and other programming services in this manner. Moreover, neither Time Warner nor Cox (the only two commenters supporting this interpretation) offer any evidence suggesting that such a rule is necessary to "ensure that the

need not be made available to competitors. *Id.* (citing *United States v. AT&T*, 522 F. Supp. 131, 189 (D. D.C. 1982)).

¹⁹² US WEST Comments at 17.

¹⁹³ *Id.* at 17, n. 58.

¹⁹⁴ 47 U.S.C. §§ 271(g)(1)(A), (B), and (C); 47 U.S.C. § 271(h).

¹⁹⁵ 47 U.S.C. § 272(a)(2)(B)(i).

¹⁹⁶ *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21950-51, ¶ 94.

¹⁹⁷ See Ameritech Comments at 21-23; SBC Comments at 12-13.

provision of [these services] by a [BOC] or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market."¹⁹⁸

52. In reaching this conclusion, we need not determine whether programming services are, in some instances, "information services," as defined by section 3(20) of the Communications Act.¹⁹⁹ Even if a video programming service were found to be an "information service," it would not be considered "interLATA" (and, thus, subject to the separate affiliate requirement of section 272(a)(2)(C)) if it is bundled with an incidental interLATA transmission component that is exempt from section 272(a)(2)(C), for the reasons set forth above. Furthermore, there is no question that a BOC would be permitted to offer a video programming service directly to the public that is not bundled with an interLATA transmission component.²⁰⁰ Finally, we reject Time Warner's contention that BOCs may provide the video programming component of an open video service only through a section 272 separate affiliate.²⁰¹ As we have explained previously, "Congress expressly directed that Title II requirements not be applied to the 'establishment and operation of an open video system.'"²⁰²

2. Teaming Arrangements

53. Section 271(g)(2) states that a BOC "may not market or sell interLATA service provided by an affiliate required by this section within any of its in-region States until such company is authorized to provide interLATA services in such State under section 271(d)."²⁰³ In comments in the underlying proceeding, the BOCs requested that the Commission clarify that section 272(g) applies only to the relationship between a BOC and its section 272 affiliate. Specifically, the BOCs argued that they are not prohibited from "aligning -- also known as 'teaming' -- with a non-affiliate that provides interLATA services and marketing their respective services to the same customers prior to receiving interLATA authority under

¹⁹⁸ See 47 U.S.C. § 271(h).

¹⁹⁹ We note that neither Time Warner nor Cox Communications (the only commenter to support Time Warner's petition) offer any arguments to support the contention that a video programming service is an information service.

²⁰⁰ See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21961-62, ¶ 115.

²⁰¹ See Time Warner Petition at 6.

²⁰² *In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996*, 11 FCC Rcd. 18223, 18347-48, ¶ 249 (1996); 47 U.S.C. § 573(c)(3).

²⁰³ 47 U.S.C. § 271(g)(2).

section 271."²⁰⁴ The Commission concluded that "section 272(g) is silent with respect to the question of whether a BOC may align itself with an unaffiliated entity to provide interLATA services prior to receiving section 271 approval."²⁰⁵ It noted, however, that, because "any equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization . . . to the extent that BOCs align themselves with non-affiliates, they must do so on a nondiscriminatory basis."²⁰⁶

54. We clarify, on our own motion, that the language concerning so-called teaming arrangements contained in the *Non-Accounting Safeguards Order* was not intended as an affirmative sanction of all teaming arrangements between a BOC and an unaffiliated entity. In particular, that language did not address the issue of whether, by entering into a business arrangement that involves the marketing of an unaffiliated entity's long distance services, a BOC may be providing interLATA service in violation of section 271(a). That question was addressed in the *Qwest Order*,²⁰⁷ where the Commission concluded that, although certain

²⁰⁴ *Non-Accounting Safeguards Order* at 22045, ¶ 289.

²⁰⁵ *Id.* at 22047, ¶ 293. We note that this conclusion was based on the Commission's determination that "the language of section 272(g) only restricts the BOC's ability to market and sell interLATA services 'provided by an affiliate required by section 272'" and in view of NYNEX's representation that teaming arrangements in which a BOC and an unaffiliated entity would market their respective services were not prohibited by the MFJ. See *Non-Accounting Safeguards Order*, 11 FCC Rcd at 22047 (citing NYNEX Reply Comments at 15-16). NYNEX argued in the *Non-Accounting Safeguards Order* that:

Nothing in the MFJ prohibited . . . and nothing in the Act prohibits a BOC from entering into a teaming arrangements with an unaffiliated interLATA provider to market their respective services to the same customers, provided all applicable nondiscrimination requirements are satisfied and provided the BOC's activity under the particular teaming arrangement does not amount to the provision of interLATA service by the BOC itself.

NYNEX Reply Comments at 15-16 (citing *Response of the United States to Ameritech's Motion for Clarification and Waiver of the Decree Regarding the Provision of Shared Telecommunications and Other Services*, p.10 n.8 (filed June 29, 1984 in *United States v. Western Elec. Co.*, 627 F. Supp. 1090 (D.D.C 1986))).

²⁰⁶ *Non-Accounting Safeguards Order* at ¶ 293.

²⁰⁷ *In the Matter of AT&T Corporation, MCI Telecommunications Corporation, Association of Local Telecommunications Services, MGC Communications, Inc., Time Warner Holdings, Inc., and NEXTLINK Illinois, Inc. and NEXTLINK Ohio, L.L.C. v. Ameritech Corporation*, File No. E-98-41 (filed June 15, 1998), *AT&T Corporation, MCI Telecommunications Corporation, Association of Local Telecommunications Services, and NEXTLINK Washington, L.L.C. v. US WEST Communications, Inc.*, File No. E-98-42 (filed June 16, 1998), and *McLeodUSA Telecommunications Services, Inc., ICG Communications, Inc., and GST Telecom, Inc. v. US WEST Communications, Inc.*, File No. E-98-43 (filed June 19, 1998), Memorandum Opinion and Order, FCC 98-242, 13 FCC Rcd 21438 (1998) (*Qwest Order*), *aff'd*, *US WEST v. FCC*, No. 98-1468, 1999 WL 362834 (D.C. Cir.,

marketing arrangements are permissible under the Act,²⁰⁸ business arrangements between a BOC and an unaffiliated long distance carrier may, nevertheless, violate section 271(a) if the BOC's involvement in the long distance market enables it to obtain competitive advantages, thereby reducing its incentive to cooperate in opening its local market to competition.²⁰⁹ The Commission noted that, in making this determination, it would balance several factors, including, but not limited to:

[W]hether the BOC obtains material benefits (other than access charges) uniquely associated with the ability to include a long distance component in a combined service offering, whether the BOC is effectively holding itself out as a provider of long distance service, and whether the BOC is performing activities and functions that are typically performed by those who are legally or contractually responsible for providing interLATA service to the public.²¹⁰

Moreover, the Commission did not reach the issue of whether business arrangements between a BOC and an unaffiliated long distance carrier are consistent with the BOC's continuing equal access obligations, it noted that the underlying arrangements "raised considerable concerns" that the equal access and nondiscrimination obligations set forth in section 251(g) had been violated.²¹¹

3. Effect On Other Commission Proceedings

55. Cox petitions us to reconcile the *Non-Accounting Safeguards Order*, which found that existing safeguards for BOC provision of incidental interLATA services are sufficient to protect telephone exchange ratepayers and competition in telecommunications

June 8, 1999).

²⁰⁸ See *Qwest Order* at ¶ 50. In the *Qwest Order*, the Commission noted that an arrangement in which a BOC would offer the services of its marketing department to market and sell a long distance product or service would be one example of a permissible marketing arrangements. The Commission explained that, "[p]rovided the BOC would make no representation that such product or service is associated with its name or services, such an arrangement would be analogous to billing and collection arrangements and would be permissible under section 271." *Id.*

²⁰⁹ *Qwest Order* at ¶ 37.

²¹⁰ *Id.* at ¶ 37. The Commission further noted that, in evaluating the BOC's actions, it would consider the totality of its involvement, rather than focus on one particular activity.

²¹¹ *Id.* at ¶¶ 53-63.

markets, with the *CMRS Safeguards Notice*²¹² and the *Video Cost Allocation Notice*,²¹³ which seek comment on what additional safeguards, if any, are necessary to protect ratepayers and competition.²¹⁴ Cox maintains that, alternatively, we could state that the *Non-Accounting Safeguards Order* does not supersede the *CMRS Safeguards* and *Cost Allocation* proceedings.²¹⁵ In response, parties submit that Cox's claims are more properly addressed in the *CMRS Safeguards* and *Video Cost Allocation* proceedings.²¹⁶

56. Since Cox filed its petition, we released the *CMRS Safeguards Order*. We concluded in that order that all incumbent LECs (except rural telephone companies) must provide in-region broadband CMRS, including cellular services, through a CMRS affiliate, subject to the accounting and affiliate transactions rules in Parts 32 and 64 of our rules.²¹⁷ Cox's concerns with regard to the *CMRS Safeguards* proceeding, therefore, are now moot. Any concerns that Cox has with regard to the *Video Cost Allocation* proceeding are more properly addressed in that proceeding.

III. REGULATORY FLEXIBILITY ACT

57. In the *Non-Accounting Safeguards Order*,²¹⁸ the Commission concluded and certified that the rules adopted in that Order would not, under the Regulatory Flexibility Act of 1980, as amended (RFA), have "a significant economic impact on a substantial number of

²¹² *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, WT Docket No. 96-162, 11 FCC Rcd 16639 (1996) (*CMRS Safeguards Notice*).

²¹³ *Allocation of Costs Associated with Local Exchange Carrier Provision of Video Programming Services*, Notice of Proposed Rulemaking, CC Docket No. 96-112, 11 FCC Rcd 17211 (1996) (*Video Cost Allocation Notice*).

²¹⁴ Cox Petition at 2, 5; Cox Reply at 2, 10.

²¹⁵ Cox Petition at 2, 5; Cox Reply at 2, 10.

²¹⁶ See BellSouth Comments at 8, SBC Comments at 13-14.

²¹⁷ *Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, Report and Order, WT Docket No. 96-162, 12 FCC Rcd 15668 (1997) (*CMRS Safeguards Order*), Order, 12 FCC Rcd 17983 (1997) (*CMRS Clarification Order*), recon. in part, First Order on Reconsideration, FCC 99-102 (adopted May 18, 1999, released June 30, 1999).

²¹⁸ *Non-Accounting Safeguards Order* at ¶¶ 357-61.

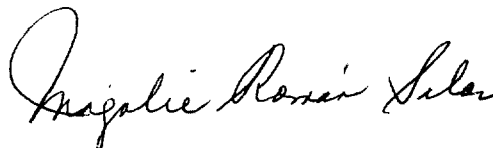
small entities."²¹⁹ The rules then adopted pertained only to BOCs, which, because of their size, do not qualify as small entities. We received no petitions for reconsideration of that Final Regulatory Flexibility Certification. In this present *Third Order on Reconsideration*, the Commission promulgates no additional final rules, and our action does not affect that previous final certification.

IV. ORDERING CLAUSES

58. Accordingly, IT IS ORDERED that, pursuant to sections 1-4, 201-205, 214, 251, 252, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 151-154, 201-205, 214, 251, 252, 271, 272, 303(r), the Third Order on Reconsideration in CC Docket No. 96-149 IS ADOPTED.

59. IT IS FURTHER ORDERED that the Petitions for Reconsideration filed by AT&T, MCI, TCG, Cox, ALTS, US WEST and Time Warner ARE DENIED, as described herein.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

²¹⁹ See 5 U.S.C. § 605(b). The RFA, *see* 5 U.S.C. § 601 *et seq.*, has been amended by the Contract with America Advancement Act of 1996, Pub. L. No. 104-121, 11- Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996.

**SEPARATE STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH
DISSENTING IN PART**

Re: Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, CC Docket 96-149

I support much of today's Order addressing petitions for reconsideration and clarification of certain aspects of the *Non-Accounting Safeguards Order*. I write separately to express a limited concern about this item. Specifically, I believe the Commission has interpreted the "operate independently" language of section 272(b)(1) far more broadly than necessary. I am concerned that the Commission has drawn elaborate restrictions on the ownership of land and the performance of repair and maintenance functions from these two words. I am also concerned that these restrictions are placed on the relationship between two affiliates independent of the Bell operating company. I would have interpreted this section more narrowly.

APPENDIX

**LIST OF PARTIES
SUBMITTING PETITIONS, COMMENTS, REPLIES, OR *EX PARTES***

Ameritech Operating Companies (Ameritech)
AT&T Corporation (AT&T)
The Association for Local Telecommunications Services (ALTS)
The Bell Atlantic Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
Cox Communications, Inc. (Cox)
MCI Telecommunications Corporation (MCI)
The NYNEX Companies (NYNEX)
SBC Communications Inc. (SBC)
Telecommunications Resellers Association (TRA)
Teleport Communications Group, Inc. (TCG)
Time Warner Cable (Time Warner)
US WEST, Inc. (US WEST)